IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 259.

THE CINCINNATI, HAMILTON AND DAYTON RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

BENJAMIN F. THIEBAUD, ADMINISTRATOR OF THE ESTATE OF CHRIS. SWEETMAN, DECEASED.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE PLAINTIFF IN ERROR.

We submit that the writ of error was properly taken from the circuit court of appeals, and that the third question should be answered in the negative.

The certificate shows that no question as to the constitutionality of the statute of Indiana was raised or considered or decided in the circuit court. The statute was not mentioned in any pleading. While the court charged the jury

that the defendant was liable under the statute, it does not appear that the question of constitutionality was considered or determined by the court.

In Ansbro *vs.* U. S., 159 U. S., 695, it was held that "an assignment of errors cannot be used to import a constitutional question into a cause, which the record does not show was raised and decided below, so as to give the Supreme Court jurisdiction under the 5th section of the act of March 3, 1891." In that case it was argued in this court that the statute under which the plaintiff in error had been convicted was unconstitutional. Mr. Chief Justice Fuller said:

"Motions to quash, to instruct the jury to find for the defendant, for a new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor by any exception to rulings on the admission or exclusion of evidence, nor to instructions given or the refusal of the instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears upon that subject is in the assignment of errors, filed February 13, 1895.

"A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision; and it is only when the constitutionality of a law of the United States is drawn in question, not incidentally but necessarily and directly, that our jurisdiction can be invoked for that reason. Borgmeyer *vs.* Idler, 159 U. S., 408; Carey *vs.* R'y Co., 150 U. S., 170; *In re* Lennon, 150 U. S., 395; Northern Pacific R'y Co. *vs.* Amato, 144 U. S., 465, 472; Sayward *vs.* Denny, 158 U. S., 180. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891."

To the same effect are—

Carey *vs.* Houston & Texas Central Railway Co., 150 U. S., 170, 181.

Northern Pacific Railway Co. *vs.* Amato, 144 U. S., 458, 472.

Cornell *vs.* Green, 163 U. S., 75.

If the third question is answered in the negative, the first and second questions become immaterial. If it is necessary to answer them, we submit that they should be answered in the affirmative. It may be that the plaintiff in error by suing out a writ from the circuit court of appeals waives the right to rely upon errors which involve the construction or application of the Constitution of the United States, but that is no impediment to the consideration and determination of the other questions in the case by the court of appeals. The statute was passed for the relief of this court, and it was not intended that the appeal must necessarily be taken to this court in every case in which the construction or application of the Constitution of the United States is involved in the circuit court. If that is the only question in the record, the appeal must, of course, be taken to this court, and it may be taken here in any case in which it is one of the questions, but the defeated party may be content with such revision of the record as the court of appeals is competent to administer.

In Staffords *vs.* King, 90 Fed., 136, the circuit court of appeals for the fourth circuit held that an appeal lies to the court of appeals, unless the constitutional question is the only and decisive question.

In Pullman's Palace Car Co. *vs.* Central Transportation Co., 39 U. S. App., 307; 76 Fed., 401 (court of appeals for the third circuit), Mr. Justice Shiras, delivering the opinion, said:

"Our view is that the party seeking to appeal is not, by the terms and meaning of the statute, put to an election between the remedies of the fifth and sixth sections, but has a right to raise a constitutional question by a resort to the Supreme Court, and to avail itself of the defenses permissible under the sixth section by an appeal to this court."

The fourth question has become immaterial in view of the decision by this court in Tullis *vs.* Lake Erie and Western R. R. Co., 175 U. S., 348, that the statute of Indiana is constitutional.

The motion to dismiss in the circuit court of appeals was made by the defendant in error. The statement in the certificate that the motion was made by the plaintiff in error is a clerical error.

LAWRENCE MAXWELL, JR.,
Counsel for the Plaintiff in Error.